

This Opinion is Not a
Precedent of the TTAB

Mailed: June 12, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Automatic Equipment Manufacturing Co. d/b/a Blue Ox
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Serial No. 90479241
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Luke C. Holst of McGrath North, PC LLO,
for Automatic Equipment Manufacturing Co. d/b/a Blue Ox.

Patrick Carr, Trademark Examining Attorney, Law Office 125,
Robin Mittler, Acting Managing Attorney.
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Before Zervas, Adlin and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Automatic Equipment Manufacturing Co. d/b/a Blue Ox (“Applicant”) seeks registration on the Principal Register of the standard character mark TRACKPRO for (as amended during prosecution) “[w]eight-distributing trailer hitches for towed vehicles” in International Class 12.¹

The Trademark Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied to

¹ Application Serial No. 90479241 was filed on January 21, 2021, under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use of the mark anywhere and first use in commerce since at least as early as June 30, 2020.

the goods identified in the Application, so resembles the mark TRAC-PRO, registered as a typed drawing on the Principal Register, for “structural parts for industrial engines for land vehicles and structural parts for industrial land vehicles; structural parts for tractors and structural parts for tractor engines,” in International Class 12,² as to be likely to cause confusion, mistake, or deception.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. The appeal is fully briefed. We affirm the refusal to register.

I. Evidentiary Issues

Before proceeding to the merits of the refusal, we address some evidentiary matters. During prosecution and on appeal, in support of the argument that the cited TRAC-PRO mark is weak, Applicant sought to rely on third-party registrations for marks containing either of the terms “TRAC(K),” “PRO” or both.³ On both occasions, Applicant merely listed the marks, registration numbers and goods, but Applicant never made the underlying registrations of record during prosecution. Both times,

² Registration No. 2866612 was issued on July 27, 2004; renewed. Prior to November 2, 2003, “standard character” marks were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (“until 2003, ‘standard character’ marks formerly were known as ‘typed’ marks.”).

³ Office Action Response of February 10, 2022, at TSDR 13; Applicant’s Brief, 4 TTABVUE 19. Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. References to the briefs on appeal refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

the Examining Attorney objected to Applicant's reliance on these third-party registrations.⁴

The submission of a mere list of registrations does not make the listed registrations part of the record. *See In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) (citing *In re 1st USA Realty Prof'ls*, 84 USPQ2d 1581, 1583 (TTAB 2007); *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208.02 (2022). To make third-party registrations part of the record, an applicant must submit copies of the registrations, or their complete electronic equivalent from the USPTO's automated systems, prior to appeal. *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2064 (TTAB 2013). We therefore do not consider any third-party registrations cited by Applicant that were not timely and properly made of record during prosecution.

Additionally, with its Reply Brief, Applicant submitted the Declaration of Paul Choquette, Applicant's Director of Operations, in which he testifies regarding the concurrent uses of the TRACKPRO and TRACK-PRO marks in commerce without evidence of actual confusion.⁵ The record in an application should be complete before the filing of an appeal. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); *see also In re tapio GmbH*, 2020 USPQ2d 11387 (TTAB 2020) (excluding, inter alia, a declaration from the applicant's attorney submitted with the brief); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.01 (2022). Any request to

⁴ Office Action of March 31, 2022, at TSDR 6; Examining Attorney's Brief, 6 TTABVUE 6.

⁵ Choquette Declaration, Applicant's Reply Brief, 7 TTABVUE 12-13.

supplement the record thereafter must be addressed through a separately filed and captioned written request to the Board for a remand to introduce additional evidence based on good cause. Trademark Rule 2.142(d); TBMP § 1209.04. Therefore, we decline to consider the Choquette Declaration as it was not timely and properly made a part of the prosecution record.

II. Likelihood of Confusion: Applicable Law and Analysis

We base our determination of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (the “*DuPont*” factors) (cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In considering the evidence of record bearing on these factors, we keep in mind that “[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We have considered each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). However, varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play

more or less weighty roles in any particular determination.”). Moreover, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source, and to protect registrants from damage caused by registration of marks that are likely to cause confusion with other registered marks. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *see also Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

A. Similarity or Dissimilarity of the Marks

1. Strength of the cited TRAC-PRO Mark

Before we evaluate the similarity or dissimilarity of the respective marks, we consider the strength of the cited TRAC-PRO mark. The strength of Registrant’s mark affects the scope of protection to which it is entitled. Thus, we consider the conceptual strength of Registrant’s mark, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength ...”). The commercial strength of the mark also is affected by the number and nature of third-party uses of similar marks for similar goods or services. *DuPont*, 177 USPQ at 567.

Because the TRAC-PRO mark is registered on the Principal Register without a claim of acquired distinctiveness, the mark is presumed to be inherently distinctive.

Tea Bd. of India v. The Rep. of Tea, Inc., 80 USPQ2d 1881, 1899 (TTAB 2006) (“A mark that is registered on the Principal Register is entitled to all [Trademark Act] Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods.”).

In its briefs, Applicant does not per se argue that the TRAC-PRO mark is conceptually weak. As noted above, Applicant did not properly make of record third-party registration evidence that the Board typically considers to show the conceptual weakness of a cited mark.⁶ *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (“[T]hird-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services.”); *see also, Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (even if “there is no evidence of actual use” of third-party registrations, such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used.”).

⁶ Applicant did not make of record any other evidence of the purported conceptual weakness of the TRAC-PRO mark, such as dictionary definitions. *Indus. Valley Bank and Trust Co. v. Bankers Trust of S. Ca., N.A.*, 201 USPQ 888, 893 (TTAB 1979) (“[A] term found in the dictionary and one that has a well[-]known meaning to the average person, ... might suggest that it is a ‘weak’ mark when used in its literal or related meanings.”)

The only third-party registration evidence that was properly introduced during prosecution (and on which Applicant now relies) was made of record by the Examining Attorney:

Mark	Reg. No. & Status	Goods
	4541663 Active	Automotive step bars and structural parts therefor; step bars for vehicles, Cl. 12

The Examining Attorney initially cited the PRO TRAXX (Stylized) mark of Reg. No. 4541663 as another basis for refusing registration of Applicant’s TRACKPRO mark on the ground of likelihood of confusion, but then withdrew it.⁷ Although withdrawn as a cited reference, Reg. No. 4541663 remains part of the prosecution record. The Examining Attorney argues, however, and we agree, that the PRO TRAXX (Stylized) mark of Reg. No. 4541663 “is much more distinguishable from either of the marks at issue here than they are from each other[,] given the transposition of the terms and the distinctive XX at the end of” the PRO TRAXX mark.”⁸

In sum, the third-party registration evidence here is insignificant compared to that found convincing in prior cases wherein “extensive evidence of third-party registrations depicting” similar marks was shown. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1363, 16 USPQ2d 1129, 1136 (Fed. Cir. 2015); *see also Juice Generation, Inc. v. GS Enters. LLC*, 794

⁷ See Office Action of August 13, 2021, at TSDR 3, 7-9; Office Action of March 31, 2022, at TSDR 5.

⁸ Examining Attorney’s Brief, 6 TTABVUE 6. The Examining Attorney’s explanation, with which we agree, belies Applicant’s claim that it was inconsistent for the USPTO to withdraw the citation to the PRO TRAXX (Stylized) mark, but not TRAC-PRO mark. Applicant’s Reply Brief, 7 TTABVUE 7-8.

F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (“A real evidentiary value of third party registrations per se is to show the sense in which ... a mark is used in ordinary parlance.” (cleaned up)).

As to commercial strength, in an ex parte appeal such as this one the owner of the cited registration is not a party, and the Examining Attorney was under no obligation to demonstrate consumers’ exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). So, the mark’s commercial strength, as usual, is treated as neutral. TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(ix) (July 2022).

Applicant provided no evidence of any third-party uses that might be “relevant to show that ... [the TRAC-PRO] mark is relatively weak and entitled to only a narrow scope of protection.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)); see also *Tao Licensing*, 125 USPQ2d at 1057 (“[E]vidence of the extensive ... use of a term by others can be powerful evidence of the term’s weakness.”).

In sum, we find the cited TRAC-PRO mark to be inherently distinctive, with commercial strength being a neutral consideration.

2. Comparison of the TRACKPRO and TRAC-PRO Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant’s and Registrant’s marks in their entirety, considering their appearance, sound, meaning and commercial impression. *DuPont*, 177 USPQ at 567; *In re Detroit*

Athletic, 128 USPQ2d at 1048. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019). More particularly, as it applies to the present appeal, “[s]imilarity in sound alone may be sufficient for a finding of likelihood of confusion.” *In re 1st USA Realty Pros., Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007) (citing *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968)). By “commercial impression” we mean “what the probable impact will be on the ordinary purchaser in the market place ...” *T. W. Samuels Distillery, Inc. v. Schenley Distillers, Inc.*, 458 F.2d 1403, 173 USPQ 690, 691 (CCPA 1972).

The test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). The parties’ marks “must be considered ... in light of the fallibility of memory ...” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). Therefore, the focus is on the recollection of the average consumer – here, the purchaser of automotive parts and accessories – who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the*

U.S. Army, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

We find that TRACKPRO and TRAC-PRO are phonetic equivalents and thus sound identical. As we noted above, similarity in sound alone is sufficient to support a finding that the compared marks are similar for likelihood of confusion purposes. *In re 1st USA Realty*, 84 USPQ2d at 1586. As to appearance, the wording TRAC in Registrant's mark will likely be perceived as a shortened form or misspelling of the term TRACK, as it merely deletes the final "k" in "track," which does not alter the sound of the term and barely alters its overall look. We further find consumers would likely perceive TRAC to be a shortened form or misspelling of TRACK. Because the respective marks share the same final element PRO and highly similar first element, TRACK or TRAC, differing only in the final letter, we find the marks look highly similar.

We also find the wording in the TRACKPRO and TRAC-PRO marks is likely to be perceived by consumers as having the same meaning and overall commercial impression. In fact, "track" and "trac" are virtually identical.

We further find that the presence of the hyphen in Registrant's mark and its absence in Applicant's mark does not distinguish the marks. Punctuation such as a hyphen generally is not sufficient to alter the connotation or overall commercial impression of otherwise similar marks and, as such, is not sufficient to distinguish them. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016) (finding "the hyphen in Applicant's mark MINI-MELTS [did] not distinguish it

from Opposer’s mark [MINI MELTS]”); *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010) (citing *Goodyear Tire & Rubber Co. v. Dayco Corp.*, 201 USPQ 485, 488 n.1 (TTAB 1978)) (finding hyphen did not distinguish the opposer’s mark, MAG-NUM STAR, from the applicant’s mark, MAGNUM MAXFIRE).

Contrary to Applicant’s assertions,⁹ the Examining Attorney did not improperly dissect the respective marks into their component parts in order to find them similar, and neither have we. Rather, as we must, we have compared the marks in their entirety, leaving no part of either mark out of the overall analysis. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 750 (Fed. Cir. 1985) (“The basic principle in determining confusion between marks is that marks must be compared in their entirety”); *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”).

Under the first *DuPont* factor, the similarity of the marks weighs in favor of a finding that confusion is likely.

⁹ See Applicant’s Brief, 4 TTABVUE 17-19.

B. The Similarity or Dissimilarity of the Respective Goods, Channels of Trade and Prospective Consumers

1. Goods

We now turn to a comparison of the goods at issue, the second *DuPont* factor, *DuPont*, 177 USPQ at 567. “This factor considers whether ‘the consuming public may perceive [the respective goods ... of the parties] as related enough to cause confusion about the source or origin of the goods ...’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)). The issue, moreover, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).¹⁰

The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that ... [the goods] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012).

¹⁰ In view of this controlling case law, Applicant’s arguments purporting to distinguish its goods from Registrant’s goods based on the purposes for which the respective goods are used are irrelevant. See Applicant’s Brief, 4 TTABVUE 16-17.

In making our determination regarding the similarity of the goods, we must look to the goods as identified in the appealed Application and the cited Registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“[T]he question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application ... regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”)); *see also Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.”).¹¹

For the reader’s convenience, we repeat the identified goods – Applicant’s identified goods are “weight-distributing trailer hitches for towed vehicles,” and Registrant’s identified goods are “structural parts for industrial engines for land vehicles and structural parts for industrial land vehicles; structural parts for tractors and structural parts for tractor engines.” We find Registrant’s structural parts for industrial land vehicles identified in the cited Registration are “so broadly worded that it legally encompasses” Applicant’s more narrowly-identified weight-distributing

¹¹ In view of this controlling case law, Applicant’s arguments purporting to distinguish its goods from Registrant’s goods as actually offered in the marketplace are irrelevant. *See Applicant’s Brief*, 4 TTABVUE 14-17; *Applicant’s Reply Brief*, 7 TTABVUE 4-7.

trailer hitches for towed vehicles such that they are “legally identical.” *Barbara’s Bakery, Inc. v. Landesman*, 82 USPQ2d 1283, 1286 (TTAB 2007).

It is unnecessary for the Examining Attorney to demonstrate that all of the goods in the Application are related to those in the cited Registration; it is sufficient if Applicant’s mark for any of its identified goods is likely to cause confusion with Registrant’s mark for any of its identified goods. *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application).

The Examining Attorney made of record portions of captured websites, showing that the same entities offer and advertise under the same mark hitches and structural parts for industrial land vehicles, engines, or tractors:

- Bobcat – offering towing hitches and structural parts for industrial land vehicles under the same mark [August 31, 2021 Office Action, at TSDR 10-25].
- Ford – offering trailer hitches and structural parts for industrial land vehicles under the same mark [August 31, 2021 Office Action, at TSDR 26-44].
- Toyota – offering tow hitches and structural parts for industrial land vehicles under the same mark [August 31, 2021 Office Action, at TSDR 45-49].
- Caterpillar – offering hitches/winches, hitch kits and engine parts for industrial land vehicles under the same mark [March 31, 2022 Office Action, at TSDR 8-24].
- Komatsu – offering tow hitches and structural parts for industrial land vehicles under the same mark [March 31, 2022 Office Action, at TSDR 25-48].
- GM (General Motors) – (offering trailer hitches and structural parts for engines under the same mark [March 31, 2022 Final Action, at TSDR 74-85].

- JCB – offering trailer hitches and structural parts for agricultural and industrial land vehicles and tractors under the same mark [March 31, 2022 Final Action, at TSDR p. 86-96].
- John Deere – offering tow hitches and structural parts for industrial land vehicles and tractors under the same mark [March 31, 2022 Final Action, at TSDR 97-128].

This type of evidence demonstrates that Applicant’s and Registrant’s goods are related for likelihood of confusion purposes. *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-03 (TTAB 2009). Based on our review of the respective identifications of goods, and the above-noted evidence, under the second *DuPont* factor, we find that Applicant’s and Registrant’s goods are identical in part and otherwise related. This factor weighs in favor of a finding that confusion is likely.

2. Channels of Trade and Potential Customers

The third *DuPont* factor “considers ‘[t]he similarity or dissimilarity of established, likely-to-continue trade channels.’” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). The trade channels factor considers the modalities and means (e.g., print, media, store aisles or shelves, or online) by which the respective goods are marketed, *see In re Majestic Distilling*, 65 USPQ2d at 1204, sold or distributed in relative proximity, *see Kangol Ltd. v. Kangaroos U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992).

Because the identification of goods in the Application and cited Registration do not include any restrictions or limitations as to trade channels, we presume the respective goods are or would be marketed in all normal trade channels for such goods, and that they are available to all classes of purchasers for those goods (that is, purchasers of structural parts for industrial engines for land vehicles, for industrial

land vehicles, for tractors and for tractor engines, and weight-distributing trailer hitches for towed vehicles). *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009).

The Examining Attorney, in fact, provided evidence that Applicant's and Registrant's types of goods are offered through the same online vendors (thus constituting overlapping channels of trade):

- Fleetfarm – shows hitches and industrial land vehicle replacement parts being offered through the same website [March 31, 2022 Office Action, at TSDR 51-61].
- RuralKing – shows hitches and industrial land vehicle and tractor parts being offered through the same website [March 31, 2022 Final Action, TSDR at 62-73].
- Summit Racing Equipment – shows hitches and engine parts being offered through the same website [March 31, 2022 Office Action, at TSDR 151-168].

Applicant criticizes the Examining Attorney's evidence as merely showing that large companies sell both Applicant's and Registrant's types of goods, and argues that this does not demonstrate an overlap in trade channels.¹² We disagree. As noted by the Examining Attorney, "[t]he evidence [described immediately above] is from specialized entities that offer the specific types of vehicle parts [recited] in the [A]pplication and [cited R]egistration, not from larger retailers that offer a range of unrelated goods."¹³ In sum, we find that the Examining Attorney's website evidence is sufficient to demonstrate an overlap in channels of trade and potential consumers.

¹² Applicant's Brief, 4 TTABVUE 13; Applicant's Reply Brief 7 TTABVUE 9-10.

¹³ Examining Attorney's Brief, 6 TTABVUE 10.

Black & Decker Corp. v. Emerson Electric Co., 84 USPQ2d 1482, 1493 n.32 (TTAB 2007) (“[T]he website evidence shows that both types of products[,] opposer’s and applicant’s[,] are sold through the same websites, so they are in the same channels of trade.”)

The third *DuPont* factor, an overlap of trade channels and prospective consumers, weighs in favor of a finding that confusion is likely.

C. Actual Confusion

The seventh *DuPont* factor is the “nature and extent of any actual confusion, while the eighth *DuPont* factor considers the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. Applicant argues it “[f]irst started selling its weight-distributing trailer hitches under the TRACKPRO mark at least as early as June 30, 2020[, and] [t]here have been no instances of actual consumer confusion regarding the source of goods between ... [Applicant] and Registrant to the best of ... [Applicant’s] knowledge.”¹⁴

Even were we to consider Applicant’s argument, it is misplaced. To begin, “a showing of actual confusion is not necessary to establish a likelihood of confusion.” *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (citing *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 296 (Fed. Cir. 1983)). Moreover, “uncorroborated statements of no known instances of actual confusion are of little evidentiary value[,]” and here because we

¹⁴ Applicant’s Reply Brief, 7 TTABVUE 13.

have excluded the Choquette Declaration there are not even uncorroborated statements; merely attorney argument. *In re Majestic Distilling*, 65 USPQ2d at 1205. We also have no evidence concerning Applicant's and Registrant's uses of the respective marks, so we cannot gauge whether there have been meaningful opportunities for actual confusion to occur. *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026–27 (TTAB 1984). We therefore find the seventh and eighth *DuPont* factors, concerning actual confusion or the lack thereof, to be neutral.

III. Likelihood of Confusion: Balancing the Factors

Weighing the *DuPont* factors for which there is evidence and argument in this appeal, *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023), we afford the registered TRAC-PRO mark the typical scope of protection given to a mark registered on the Principal Register. Based on the elements of appearance, sound, meaning and commercial impression, the TRACKPRO and TRAC-PRO marks are very similar, and are identical in sound. Based on the evidence of record, Applicant's and Registrant's goods are identical in part, otherwise related, travel in overlapping trade channels, and are directed to the same target consumers. These factors support a finding that confusion is likely. The absence of actual confusion is a neutral consideration in our analysis. On balance, we find confusion is likely between Applicant's and Registrant's marks for the identified goods.

Decision:

The refusal to register Applicant's TRACKPRO mark on the ground of likelihood of confusion under Trademark Act Section 2(d) is affirmed.